IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1356.

MERCEDES-BENZ OF NORTH AMERICA, INC.
and DAIMLER-BENZ A. G.,

Petitioners,

v.

JULES LINK and SOLOMON KATZ, on Behalf of Themselves
and All Others Similarly Situated,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF STATUTORY CERTIORARI, AND, IN THE ALTERNATIVE, FOR A WRIT OF COMMON LAW CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND MOTION FOR LEAVE TO FILE PETITION.

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INTRODUCTION.

The petitioners seek review of the refusal by a court of appeals to entertain an interlocutory appeal under 28 U. S. C. § 1292(b) from a class action determination by a district court. Such review is totally contrary to the intendment of that statute and may not be had. *Liberty Mutual Insurance Co. v. Wetzel,* 424 U. S. 737 (1976). Accordingly, none of the questions presented warrants review.

STATEMENT OF THE CASE.

I. Nature of the Case.

Respondents, Jules Link and Solomon Katz commenced this action on March 27, 1974 against petitioners, Mercedes-Benz of North America, Inc. ("MBNA") and Daimler-Benz A. G. ("DBAG"),[1] on their own behalf and on behalf of all persons who have had non-warranty repairs performed by authorized Mercedes dealers ("dealers") on Mercedes-Benz automobiles owned or leased by them during the period from March 1970 to the date of filing the Complaint.

The Complaint alleges that petitioners conspired with each other and with *certain* non-defendant co-conspirator dealers[2] to fix labor times and prices of parts for non-warranty repairs charged by dealers in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1. The Complaint seeks both damages and injunctive relief under 15 U. S. C. §§ 4, 16.

DBAG is the manufacturer of the motor vehicles and motor vehicle parts bearing the Mercedes-Benz name and the three pointed star trademark. MBNA is the exclusive distributor of Mercedes-Benz motor vehicles and parts in the United States.

MBNA appoints dealers who sell Mercedes-Benz motor vehicles and parts and service such motor vehicles pursuant to standard form dealer agreements. (R214-224)[3] Included in the standard dealer agreements are provisions requiring dealers (a) to use in the repair and

1. MBNA is a wholly-owned subsidiary of DBAG.

2. The Complaint does not allege, as petitioners contend, that the conspiracy includes all dealers.

3. References to the Appendix in the Third Circuit, certified to this Court as the Record, are cited herein as "R".

servicing of Mercedes automobiles only Mercedes-Benz parts or parts expressly approved by DBAG if such parts are "necessary to the mechanical operation" of such automobiles, and (b) to agree to contribute an amount established by MBNA to the cost of the price list and maintenance service manuals, including labor time guides, provided to the dealers by MBNA.

While the current price list includes 26,000 *items*, in fact the number of actual *parts* is a small percentage thereof, and many models of a given part are sold at the same price. (R210-213) Moreover, different parts have the same "dealer net price", "suggested wholesale price", and "suggested list price". (R210-213) Also, markups are pronouncedly consistent. (R210-213)

The labor time guides direct dealers to:

> "Price the Repair Order—Use the time shown for each Complete and Related Operation. Determine the price by using the Computation tables." (R228)

All dealers attend district and zone meetings in the eight zones in the United States, called and attended by representatives of MBNA. At zone meetings dealers elect members of the National Dealer Council. The agenda for meetings of the National Dealer Council is made up from reports of the zone meetings. DBAG officers, as well as MBNA representatives, attend meetings of the National Dealer Council, and DBAG has final word on the action of the Dealer Council, at which such topics as prices are discussed.

II. Proceedings in the District Court.

Rather than answer the Complaint, petitioners on May 17 and 20, 1974, respectively, filed motions to dismiss

under Rule 12(b) [4] for lack of jurisdiction over the person, and improper venue and service of process.[5]

Pursuant to Local Rule 45 of the Eastern District of Pennsylvania, respondents on September 9, 1974 moved for class determination under each sub-section of Rule 23. After argument, the district court on July 8, 1975 entered an Order, granting the class motion. Upon petitioners' motion, the district court on August 7, 1975 entered an Order, without opinion,[6] vacating its July 8 Order, certfiying a class under Rule 23(b)(3) [7] and stating that the following issues were controlling questions of law under 28 U. S. C. § 1292(b):

> "A. Whether it is proper to certify a class of approximately 300,000 members where the proof of damage will vary for each member of the class;
>
> "B. Whether there can be a bifurcated trial in this case of liability and damages with separate juries for each segment of the case . . .". (A2)

Although the district court posed the second question, it did not order such a bifurcated trial.

The district court on September 25, 1975 filed a Memorandum Opinion setting forth the history of the class action motion and the findings supporting its determination. (A5-17) [8]

4. All references to a Rule or Rules are to the Federal Rules of Civil Procedure unless otherwise noted.

5. Those motions were denied on December 18, 1975.

6. The district court stated in that Order, "[A] Memorandum Opinion with the Court's findings will be filed hereafter." (A3) References to the Appendix to the Petition are cited herein as "A".

7. "The class herein is defined as all persons, firms or corporations who have had nonwarranty auto repairs performed on Mercedes-Benz automobiles, owned or leased by them, by Mercedes-dealers, during the period March 27, 1970 to March 27, 1974." (A1)

III. Proceedings in the Court of Appeals.

On August 15, 1975, petitioners filed a petition for leave to appeal pursuant to 28 U. S. C. § 1292(b), and respondents filed their answer thereto on August 22, 1975. On September 12, 1975, thirteen days *prior* to the Memorandum Opinion of the district court, the court of appeals granted petitioners permission to appeal.

A panel of the court of appeals on July 22, 1976, after reviewing the district court's Memorandum Opinion, unanimously declined to review the questions certified by the district court as did a majority of the court *en banc* on February 11, 1977.

IV. Proceedings in This Court.

On April 4, 1977, petitioners filed their petition for a writ of certiorari, and in the alternative, for a writ of common law certiorari pursuant to 28 U. S. C. §§ 1254(1) and 1651, respectively.

8. Although that Opinion states that "the most appropriate way to proceed in this case is to bifurcate the issues of liability and damages" (A10), the District Court did not order or even discuss a bifurcated trial with separate juries therein.

SUMMARY OF REASONS FOR DENYING THE WRIT.

The writ should be denied because:

1. Congress mandated that the determination to review an interlocutory order of a district judge under 28 U. S. C. § 1292(b) is vested in the sole discretion of the respective courts of appeals;

2. A class action determination is inappropriate for interlocutory review under 28 U. S. C. § 1292(b) since:

(a) it is discretionary,

(b) it is conditional and may be modified by the district court under Rule 23(c)(1), and

(c) it does not present a controlling question of law within the meaning of that statute; and

3. The district court did not order separate trials on the issue of liability and damages before different juries and hence any question concerning the right of trial by jury under the Seventh Amendment is hypothetical.

REASONS FOR DENYING THE WRIT.

I. The Refusal by a Court of Appeals to Entertain an Appeal Under 28 U. S. C. § 1292(b) Is Not Reviewable by This Court.

As the legislative history of 28 U. S. C. § 1292(b) [9] clearly demonstrates, a court of appeals may deny leave to appeal under that section for *any* reason, and indeed without stating any reason.

> "The granting of the appeal is also discretionary with the court of appeals which may refuse to entertain such an appeal in much the same manner that the Supreme Court today refuses to entertain applications for writs of certiorari.
>
> "It should be made clear that if application for an appeal from an interlocutory order is filed with the court of appeals, the court of appeals may deny such application without specifying the grounds upon which such a denial is based. It could be denied on the basis that the docket of the circuit court of appeals was such that the appeal could not be entertained for too long a period of time. But, whatever the reason, the ultimate determination concerning the right of ap-

9. "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

peal is within the discretion of the appropriate circuit court of appeals." [10]

Congress clearly intended that the right to appeal under 28 U. S. C. § 1292(b) be finally determined by the respective courts of appeals. Thus, no "conflict" with other circuits within the meaning of Sup. Ct. R. 19.1(b) can exist. That some courts of appeals may choose to exercise their discretion sparingly, while others may more freely entertain appeals, is entirely within the contemplation of the statute.[11]

Indeed, this Court in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U. S. 737, 747 (1976), cited at page 11 of the Petition, specifically noted the complete discretion of courts of appeals to accept or reject appeals under 28 U. S. C. § 1292(b) although the jurisdictional criteria of that statute have been met, stating:

> "There can be no assurance that had the other requirements of § 1292(b) been complied with, the Court of Appeals would have exercised its jurisdiction to entertain the interlocutory appeal."

10. S. Rep. No. 2434, 85th Cong. 2d Sess. 3, 4, set out in 1958 U. S. Code Cong. & Adm. News 5257.

11. Other circuits have similarly rejected appeals under 28 U. S. C. § 1292(b) of orders granting class action status. *E.g., Glenn v. Arkansas Best Corp.*, 525 F. 2d 1216, 1217 (5th Cir. 1976). And in *Tucker v. Arthur Andersen & Co.*, No. 75-8143 (2d Cir. June 19, 1975) review of class certification under 28 U. S. C. § 1292(b) was denied although the district court had urged therein, as petitioners here urge, that "[i]f the court's order were reversed, protracted and expensive litigation may very well be avoided . . . ." *Tucker v. Arthur Andersen & Co.*, 67 F. R. D. 468, 485 (S. D. N. Y. 1975). (That order appears in the Appendix hereto.)

II. Review by a Court of Appeals Under 28 U. S. C. § 1292(b) of an Order Which Is Both Discretionary and Conditional Should Not Be Permitted.

Courts of appeals have held that matters entrusted to the discretion of the district court are not reviewable under 28 U. S. C. § 1292(b). *E.g., J. C. Trahan Drilling Contractor, Inc. v. Sterling*, 335 F. 2d 65 (5th Cir. 1964); *Atlantic City Electric Co. v. A. B. Chance Co.*, 313 F. 2d 431 (2d Cir. 1963). Interlocutory appeal of a class certification, which not only involves the exercise of discretion but also "may be conditional, and may be altered or amended before the decision on the merits" [12], is even less appropriate. It would make a mockery of the "final judgment" rule if an appeal were permitted where the order from which appeal is sought is both discretionary and subject to modification.

III. No "Controlling Question of Law" Has Been Presented Within the Meaning of 28 U. S. C. § 1292(b).

To qualify for appeal under 28 U. S. C. § 1292(b) "[i]t is necessary . . . that the order involve a clear cut question of law against a background of determined and immutable facts". 9 *Moore's Federal Practice* ¶ 110.22[2] at p. 261.

As to the first question certified by the district court, regarding numerosity of the class, that question is, as the court of appeals correctly concluded, "primarily a factual one with which a district court generally has a greater familiarity and expertise than does a court of appeals." [13] The size of the class certified and the impact of class size on

12. Rule 23(c)(1).

13. A32.

the course of the litigation does not transmute the question of manageability from one of fact to one of law.[14]

Moreover, all of the findings of a district court in support of class certification under Rule 23(b)(3) are findings of fact. Rule 23(b)(3) provides, in pertinent part, that a class action is maintainable if "the court *finds* that questions of law or fact common to the members of the class predominate . . ." "The matters pertinent to the *findings* include . . ." (emphasis supplied). *The Manual for Complex Litigation*, § 1.40 at 21 n. 25 (West ed. 1973) states: "[The class action determination] normally involves the resolution of factual issues". See also *In Re Antibiotic Antitrust Actions*, 333 F. Supp. 291, 296 (S. D. N. Y. 1971):

> "[T]he court finds that these [class action] orders, particularly as they relate to the manageability issue do not present questions of law. The questions presented are factual in nature and concern the district judge's continuing exercise of the discretion vested in him by Rule 23."

The second question certified by the district court, the propriety of separate juries for each segment of a bifurcated trial, is, as the court of appeals correctly noted, entirely hypothetical. The district court entered no order directing separate juries, and whether it will do so is a

14. Many cases involving as many or more class members as herein have been certified as class actions. *E.g., Dennis v. Saks & Co.*, 1975-2 Trade Cases ¶ 60,396 (S. D. N. Y. 1975) (three subclasses, one with 100,000 members, another with 244,000 members, and a third with 269,000 members); *Sommers v. Abraham Lincoln Federal Saving & Loan Ass'n*, 66 F. R. D. 581 (E. D. Pa. 1975) (379,000 class members); *Hemley v. American Honda Motor Co., Inc.*, 1975-2 Trade Cases ¶ 60,457 (S. D. N. Y. 1975) (at least 500,000 to 1,000,000 class members); *Arenson v. Board of Trade*, 372 F. Supp. 1349 (N. D. Ill. 1974) (400,000 class members); *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278 (S. D. N. Y. 1971) (estimated 4,850,000 class members). See also *Eisen v. Carlisle & Jacquelin*, 417 U. S. 156 (1974).

matter of pure speculation.[15] Accordingly, the court of appeals declined to give an advisory opinion, as have other courts of appeals faced with similar requests. See *Nickert v. Puget Sound Tug & Barge Co.*, 480 F. 2d 1039, 1041 (9th Cir. 1973); *Control Data Corp. v. International Business Machines Corp.*, 421 F. 2d 323, 325 (8th Cir. 1970).

Petitioners next advance the novel proposition that all certifications of "large" classes present controlling questions of law because of their alleged *in terrorem* effect on settlement.[16] Even if that effect did exist, what petitioners urge is that a district court cannot certify a class unless it finds that the claims asserted are meritorious. That inquiry is impermissible. *Eisen v. Carlisle & Jacquelin, supra*, at 177-178. Moreover, as the court noted in *Blackie v. Barrack*, 524 F. 2d 891, 899 n. 15 (9th Cir. 1975), *cert. denied*, — U. S. — (1976), there is no empirical evidence of any such effect. In fact, the empirical evidence that exists dictates a contrary conclusion. As that court stated:

> "The empirical evidence on the subject is very limited, and not particularly helpful because it provides no basis for comparison of class actions with other suits. For what it is worth, however, the empirical evidence indicates that a relatively high proportion of class actions are not settled, but disposed of in defendant's favor on preliminary motions. *See* Committee on Commerce, United States Senate, *Class Action Study*, 93d Cong., 2d Sess. (1974), Committee Print at 9-10. On the basis of the evidence before it, the Commerce Committee concluded that the class action was not a particularly effective vehicle for coercing settlements."

15. A33.

16. Petition, pp. 14-16.

The court went on to observe:

"Precisely the same power to coerce a settlement (and defeat review of potentially erroneous previous orders) is wielded by any plaintiff with a substantial claim—that fact alone does not generally confer appealability on an order which effectively requires a defense to a large claim."

524 F. 2d at 899.

"We note that the supposed *in terrorem* effect of the class certification will persist despite a right of immediate appeal—the claim may be frivolous and the class proper. Immediate appeal will eliminate only the improperly certified coercive class action, at the expense of both frivolous and non-frivolous, properly certified classes. It may well be better to attack the 'blackmail' problem directly with appropriate safeguards rather than collaterally undermining the final decision rule."

524 F. 2d at 899 n. 14.

"[W]e have no means of deciding whether the present hue and cry of 'blackmail' in fact reflects an abnormally high instance of unfairly coerced settlements, or is rather the pained outcry of defendants whose previously advantaged litigating position has been undermined, and who must now confront small claimants (who have been given the capacity to exert pressure proportionate to the magnitude of the total injury occasioned by defendant's alleged violation of the law) on more equal grounds."
524 F. 2d at 900.

The unfortunate impact of interlocutory appeals on the prosecution of class actions is apparent from the instant case in which the action was commenced on March 27,

1974, the district court certified the class on August 7, 1975 and now, almost three years after the action was commenced, and twenty-one months following the class certification, the class has yet to receive notice of the action. Class size is no excuse for such inordinate delay.

IV. The District Court Properly Certified the Class.

The existence and illegality of the conspiracy alleged are common issues of law and fact, as is the question of the circulation of documents establishing prices for parts and designated labor times.[17]

It is well established that when a price-fixing conspiracy is alleged, as herein, common questions of law or fact predominate over individual questions, making class certification appropriate.[18] *Robertson v. National Basket-*

17. Indeed, this Court in *United States v. Container Corp. of America*, 393 U. S. 333 (1969), held that the exchange of price information among competitors may, by itself, establish the existence of a price-fixing conspiracy in violation of Section 1 of the Sherman Act. Printing, publishing and circulating a price list by a trade association was held to establish the existence of a price-fixing conspiracy in *Plymouth Dealers' Ass'n. of Northern California v. United States*, 279 F. 2d 128 (9th Cir. 1960). See also, *Goldfarb v. Virginia State Bar*, 421 U. S. 773 (1975); *Interstate Circuit v. United States*, 306 U. S. 208 (1939); *United States v. Nationwide Trailer Rental System, Inc.*, 156 F. Supp. 800 (D. Kan. 1957). Moreover, membership in a trade association which held meetings where prices were discussed supports a finding of participation in an illegal price-fixing conspiracy. *Bray v. Safeway Stores, Inc.*, 392 F. Supp. 851 (N. D. Cal. 1975).

18. Impact of that price-fixing conspiracy on the class may be inferred: *In re Master Key Antitrust Litigation*, 528 F. 2d 5, 12 (2d Cir. 1975); *Lessig v. Tidewater Oil Co.*, 327 F. 2d 459, 471 fn. 31 (9th Cir.), *cert. denied*, 377 U. S. 995 (1964); *Phillips v. Crown Central Petroleum Corp.*, 1975-1 Trade Cases ¶ 60,335 (D. Md. 1975). See *In re Ampicillin Antitrust Litigation*, 55 F. R. D. 269 (D. D. C. 1972); *Illinois v. Harper & Row Publishers, Inc.*, 301 F. Supp. 484 (N. D. Ill. 1969).

For, as Judge Gibbons commented in *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F. 2d 102, 128 (3d Cir. 1976) (dissenting opinion): ". . . I have never heard of a price-fixing conspiracy aimed at reducing prices to consumers . . .

ball Ass'n, 1975-1 Trade Cases ¶ 60,168 at 65,546 (S. D. N. Y. 1975); *Herrmann v. Atlantic Richfield Co.,* 65 F. R. D. 585 (W. D. Pa. 1974); *Professional Adjusting Systems, Inc. v. General Adjustment Bureau, Inc.,* 64 F. R. D. 35 (S. D. N. Y. 1974); *Jacobi v. Bache & Co., Inc.,* 1972 Trade Cases ¶ 73,980 (S. D. N. Y. 1972); *City of Philadelphia v. American Oil Co.,* 53 F. R. D. 45 (D. N. J. 1971); *Sol S. Turnoff Drug Distributors, Inc. v. N. V. Nederlandsche Combinatie Voor Chemische Industrie,* 51 F. R. D. 227, 233 (E. D. Pa. 1970); *Illinois v. Harper & Row Publishers, Inc., supra; Minnesota v. United States Steel Corp.,* 44 F. R. D. 559, 572 (D. Minn. 1968).[19]

V. The Review of the Propriety of a Bifurcated Trial Before Separate Juries Would Be Inappropriate, and, in Any Event, That Procedure Is Constitutionally Permissible.

A. The District Court Did Not Order a Bifurcated Trial Before Separate Juries.

As the court of appeals correctly observed, the district court did not order a bifurcated trial of liability and damages before separate juries, nor did the district court indicate that such bifurcated trials were necessary. (A33-34) The use of that procedure in this action is, therefore, entirely conjectural. Accordingly, its constitutionality is not subject to review by this Court. *Government & C. E. O. C., CIO v. Windsor,* 353 U. S. 364, 366 (1957). As Mr. Justice Frankfurter noted in his concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U. S. 123, 155 (1951):

> "Courts do not review issues, especially constitutional issues, until they have to. [citations omitted] In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary."

19. See also discussion at pp. 17-18, *infra.*

In the recent opinion by the Second Circuit in *In re Master Key Antitrust Litigation, supra,* in which the appeal was dismissed for lack of jurisdiction, that court commented:

> "Appellants' final argument is that they will be prejudiced in their defense if the same jury does not hear both the liability and damage portions of the action. They also suggest that use of separate juries in those two trials might infringe their Seventh Amendment rights. Without in any way commenting on the validity of these arguments, we merely note that they are *wholly speculative* at this point. Judge Blumenfeld has indicated that one jury may hear both the liability and damage claims in this action. *Cf. Swofford v. B & W, Inc.,* 336 F. 2d 406, 415 (5th Cir. 1964), *cert. denied,* 379 U. S. 962 (1965). It would plainly be premature for us to rule on the appropriateness of using two juries where only one, in fact, may be involved. We should only note that bifurcated trials have frequently been employed with great success, *see* C. Wright & A. Miller, *supra* §§ 2390-91: *Green v. Wolf Corp.,* 406 F. 2d 291, 301 (2d Cir. 1968), *cert. denied,* 395 U. S. 977 (1969) (class action in securities litigation), even in antitrust suits, *see Goldfarb v. Virginia State Bar, supra.*" (emphasis supplied) 528 F. 2d at 15.

It is far from clear that a bifurcated trial will be necessary in this action. Moreover, even if that procedure should prove necessary, both trials could be had before the same jury (a procedure which is facilitated by the use of

alternate jurors), as was done in *Idzojtic v. Pennsylvania Railroad Co.*, 456 F. 2d 1228 (3d Cir. 1972); *Driver v. Phillips*, 36 F. R. D. 261 (E. D. Pa. 1964), and *Eastern Fireproofing Co. Inc. v. United States Gypsum Co.*, 50 F. R. D. 140 (D. Mass. 1970) (an antitrust action in which the court reconvened the same jury to determine damages more than two years following the trial on liability). If both trials are before one jury, bifurcation clearly does not present a constitutional issue.

B. A Bifurcated Trial Before Separate Juries Is Constitutionally Permissible.

If bifurcation and use of separate juries proves necessary (which is by no means likely), that procedure would not violate the Seventh Amendment right to jury trial.

This Court held in *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494 (1931) that the constitutional right to jury trial is not abrogated when an appellate court orders a new trial on one of several issues unless the issue to be retried is inseparably interwoven with the remaining issues. Following *Gasoline Products* courts of appeals have reversed verdicts in a number of antitrust actions and remanded only the issue of damages. *E.g., Pitchford v. PEPI*, 531 F. 2d 92, 107, 111 (3d Cir.), cert. denied, — U. S. — (1976); *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America*, 509 F. 2d 784 (5th Cir.), *cert. denied*, 423 U. S. 833 (1975) (damage verdict sustained in an antitrust case in which that issue was tried separately on remand before a jury different from the one which heard and found liability); *Household Goods Carriers' Bureau v. Terrell*, 452 F. 2d 152 (5th Cir. 1971).

The issues of liability and damage in an action involving a price-fixing conspiracy are separate and distinct. Impact (or fact of damage as opposed to amount)

is inferred from the existence of the price-fixing conspiracy. See n. 18, *supra*.[20] As the Second Circuit held in *In Re Master Key Antitrust Litigation, supra:*

> "If the appellees establish at the trial for liability that the defendants engaged in an unlawful national conspiracy which had the effect of stabilizing prices above competitive levels, and further establish that the appellees were consumers of that product, we would think that the jury could reasonably conclude that appellants' conduct caused injury to each appellee. [citations omitted] The amount of such injury could then be computed at a separate trial for damages, and appropriate substratification of classes could be utilized to facilitate that determination." [citations omitted] 528 F. 2d at 12.

A bifurcated trial before separate juries of the issues of violation and damage, which issues clearly do not overlap, is, as suggested by Judge Gibbons (A62), likewise permissible.[21]

Finally, although irrelevant to the issue of a bifurcated trial before separate juries, petitioners suggest that the trial on damages would be unmanageable (Petition at p. 30). That argument has been rejected as a bar to class action certification. *E.g., Blackie v. Barrack, supra; Gold Strike Stamp Co. v. Christensen*, 436 F. 2d 791, 798 (10th Cir. 1970); *Green v. Wolf Corp.*, 406 F. 2d 291 (2d Cir. 1968), *cert. denied*, 395 U. S. 977 (1969); *In Re Master Key Antitrust Litigation*, 70 F. R. D. 23, 26 (D. Conn.), *appeal dismissed*, 528 F. 2d 5 (2d Cir. 1975); *Aamco*

20. See also *In Re Sugar Industry Antitrust Litigation*, 1977-1 Trade Cases ¶ 61,373 at 71,336-71,338 (N. D. Cal. 1976) and the cases cited therein.

21. See *Windham v. American Brands, Inc.*, 539 F. 2d 1016 (4th Cir. 1976) (case *sub judice*, following reargument before that court *en banc*).

Automatic Transmissions, Inc. v. Tayloe, 67 F. R. D. 440 (E. D. Pa. 1975); *Cutner v. Fried,* 373 F. Supp. 4, 12-13 (S. D. N. Y. 1974); *Professional Adjusting Systems, Inc. v. General Adjusting Bureau, Inc., supra; Siegel v. Realty Equities Corp. of New York,* 54 F. R. D. 420, 427 (S. D. N. Y. 1972); *Illinois v. Harper & Row Publishers, Inc., supra; Contract Buyers League v. F & F Investment,* 48 F. R. D. 7 (N. D. Ill. 1969); *Minnesota v. United States Steel Corp., supra.*

In antitrust actions damages need not be exact *Bigelow v. RKO Radio Pictures, Inc.,* 327 U. S. 251, 264 (1946); *Richfield Oil Corp. v. Karseal Corp.,* 271 F. 2d 709, 713-716 (9th Cir. 1959), *cert. denied,* 361 U. S. 961 (1960), and are usually measurable by a simple statistical formula. *Barr v. WUI/TAS, Inc.,* 66 F. R. D. 109 (S. D. N. Y. 1975); *In Re Antibiotic Antitrust Actions,* 333 F. Supp. 278, 289 (S. D. N. Y. 1971).[22]

In *Bray v. Safeway Stores, Inc., supra,* the court observed:

> "The defendant argues further that the across the board 20 cent figure fails to take into account the prices actually received by the plaintiffs and ignores price fluctuations due to differences in time, location, quality, and type. There can be little doubt that the damage figure was based upon evidence reflecting national averages. However, when the national averages are compared with the prices actually received by the plaintiffs, it is apparent that the averages are representative within tolerable limits and are appropriate to utilize as standards for projection. The Court does not expect the plaintiffs to prove the exact loss suffered

22. A comprehensive analysis of proof of damage in antitrust price-fixing cases is found in *In Re Sugar Industry Antitrust Litigation, supra* at 71,338-71,339.

> on each sale; as noted above, such a requirement would place upon the plaintiffs an impossible burden. The 20 cent figure constitutes an average flexible enough to account for the variations discussed by the defendant." 392 F. Supp. at 864.

CONCLUSION.

For the reasons set forth, the Petition of Mercedes-Benz of North America, Inc. and Daimler-Benz A. G. for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted,

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DATED: May 4, 1977.

APPENDIX.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT.

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 19th day of June, one thousand nine hundred and seventy-five

Gilbert Tucker, Lucille Tucker, Larry Krutick, Edwina Krutick, Moses Katcher, Albert Segal and Adelaide Segal,

Plaintiffs-Respondents,

v.

Arthur Andersen & Company,

Defendant-Petitioner.

Arthur Andersen & Company,

Defendant and Third Party Plaintiff-Petitioner,

v.

Joseph A. Bonura, Empire National Bank (as successor in interest to County National Bank), Lynda Dick, Executrix of the Estate of Jack R. Dick and Herman L. Meckler,

Third-Party Defendants-Respondents.

It is hereby ordered that the motion made herein by counsel for the petitioner dated June 2, 1975 for leave to

appeal under 28 U. S. C. 1292(b) be and it hereby is denied.

WILFRED FEINBERG,
Wilfred Feinberg,
JAMES L. OAKES,
James L. Oakes,
ELLSWORTH A. VAN GRANFEILAND,
Ellsworth A. Van Granfeiland,
Circuit Judges